Improving Summary Jury Trials: Insights from Psychology

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Since its inception in 1980, the summary jury trial (SJT), a non-binding abbreviated jury trial used as a basis for settlement negotiations, has received significant attention in scholarly journals and in the courts.[1] As the only alternative dispute resolution (ADR) procedure that relies on public participation through the use of a jury, SJTs have been heralded as the best mechanism for predicting jury verdicts and for promoting settlement in cases that would otherwise be decided by a traditional jury.[2] Some commentators have extolled the virtues of SJTs; others have criticized them on both theoretical and practical grounds. Despite the extent of scholarly evaluation, however, very little analysis has drawn from the rich psychological research on juries.

The absence of this analytical focus is surprising given that SJTs are a form of jury trial, and legal scholars have evaluated traditional jury trials in light of psychological jury research on innumerable occasions.[3] In an attempt

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[1] *See* Neil Vidmar & Jeffrey Rice, *Jury Determined Settlements, and Summary Jury Trials: Observations About Alternative Dispute Resolution in an Adversary Culture*, 19 FLA. ST. U. L. REV. 89, 95–103 (1991).

[2] In fact, Judge Lambros, the creator of SJTs, has emphasized that "[t]he strength of the summary jury trial is derived from the ability to use the SJT to predict or forecast a jury outcome which can then be used as an aid to settlement." Thomas D. Lambros, *The Summary Jury Trial-Ending the Guessing Game: An Objective Means of Case Evaluation*, 12 OHIO ST. J. ON DISP. RESOL. 621, 622 (1997).

[3] *See, e.g.*, Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63, 75–76 (1993) (reviewing psychological research suggesting criteria that courts could use to identify cases in which jury discrimination is most likely to affect the verdict); Jennifer K. Robbennolt, *Determining Punitive Damages: Empirical Insights and Implications for Reform*, 50 BUFF. L. REV. 103, 167–89 (2002) (considering the implications of psychological research for punitive damages reform); Roselle L. Wissler et al., *Instructing Jurors on General Damages in Personal Injury Cases: Problems and*

to help fill the void in the literature, this Article provides a critical analysis of SJTs from a psychological perspective, with substantial emphasis on jury psychology. This Article concludes that the SJT is a promising ADR tool, but that it falls significantly short of its potential. By implementing insights drawn from psychological research, the effectiveness of this form of ADR can be considerably enhanced. This Article should serve as a useful starting point for establishing procedures that comport with the wisdom derived from empirical findings.[4]

Part I of this Article will describe SJTs, while Part II will provide a general overview of psychological research which, it will be argued, suggests that SJTs do not meet their potential with respect to predicting traditional jury decisions. Part III will analyze how summary jurors are treated, drawing parallels to the treatment of participants of psychological research, and offer some ideas for improving this aspect of SJTs. Finally, Part IV will recommend more empirical research on SJTs, and conclude by advising SJT administrators to adhere to appropriate ethical norms in order to protect the reputation of the legal system.

I. WHAT IS A SUMMARY JURY TRIAL?

Summary jury trials are essentially "non-binding abbreviated trials by mock jurors who are chosen from the jury pool" at the behest of the court.[5] Judge Thomas Lambros of the U.S. District Court for the Northern District of Ohio created this procedure in 1980 in "response to burgeoning court

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Possibilities, 6 PSYCHOL. PUB. POL'Y & L. 712 (2000) (discussing research on the effectiveness of alternative forms of jury instructions and proposed trial procedures for ameliorating juror compliance with these instructions); Donna Shestowsky, Note, *Where is the Common Knowledge? Empirical Support for Requiring Expert Testimony in Sexual Harassment Trials*, 51 STAN. L. REV. 357, 367–84 (1999) (reviewing cases which used jury research on sexual harassment issues to improve sexual harassment trials).

[4] There is plenty of opportunity for continued experimentation on SJTs:

> The plans of many districts indicate that summary jury trials . . . are available as ADR mechanisms, but do not specify procedures or rules for conducting these processes . . . . Because many plans do not include procedures for summary jury trials, judicial officials who preside over such trials presumably have discretion to devise their own procedures, perhaps in consultation with the parties.

John Maull, *ADR in the Federal Courts: Would Uniformity be Better?*, 34 DUQ. L. REV. 245, 251 (1996).

[5] ROBERT B. MCKINNEY & EDITH B. PRIMM, GEORGIA PROCEDURE § 9:11 (2002). SJTs substantially deviate from the conventional trial format in that usually no sworn testimony is taken from witnesses and counsel are expected to submit the relevant exhibits, all of which must be admissible under the Federal Rules of Evidence. 5A O. JUR. 3d, *Alternative Disp. Resol.* § 27 (1997).

dockets."[6] Since then, thirty-nine federal district courts have approved their use, and Congress has authorized them in the Civil Justice Reform Act of 1990.[7] They are most commonly used for high-stakes cases that would likely result in long and protracted jury trials if they were litigated. Most courts that offer SJTs follow Lambros' formulation, in which a judge suggests or requires their use for parties who cannot agree on settlement terms during the course of pretrial conferences.[8]

The verdicts that summary jurors recommend are intended to provide the starting point for settlement negotiations.[9] Because every case is unique,

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[6] Thomas D. Lambros, *The Summary Jury Trial: An Effective Aid to Settlement*, 77 JUDICATURE 6, 6 (1993).

[7] Maull, *supra* note 4, at 250; Civil Justice Reform Act of 1990, 28 U.S.C. § 471 (2002). "Before this explicit statutory authorization, Federal Rules 1, 16, and 39(c) implicitly authorized courts to conduct such trials with jurors who rendered advisory verdicts that facilitated dispute resolution." Lambros, *supra* note 6, at 7; *see also* Elizabeth Plapinger & Donna Stienstra, *Federal Court ADR: A Practitioner's Update*, 14 ALTERNATIVES TO HIGH COST LITIG. 7, 7 (1996) (noting that although more than half the districts now authorize judges to employ SJTs, most courts report only one or two cases per year).

[8] *See* Charles F. Webber, Comment, *Mandatory Summary Jury Trial: Playing by the Rules?*, 56 U. CHI. L. REV. 1495, 1497 (1989); Lucille M. Ponte, *Putting Mandatory Summary Jury Trial Back on the Docket: Recommendations on the Exercise of Judicial Authority*, 63 FORDHAM L. REV. 1069, 1085 (1995). "The Sixth and Seventh Circuits accept only voluntary SJT . . .[,] [b]ut in an effort to deal with burgeoning caseloads, some federal courts have approved compulsory SJT use" that is mandated without the parties' mutual agreement. *Id.* With respect to whether or not SJTs should be binding, Lambros argues:

> When it is clear that the parties have no interest whatsoever in settling their differences, and only a final adjudication will ultimately resolve the case, neither the summary jury trial nor any other means of judicially sponsored mediation will induce a settlement. However, where the trial court, in its discretion, believes that there is sufficient interest in a settlement or that one of the parties' view of the facts or the law is so inconsistent with the likely findings of a jury that a summary jury trial may facilitate settlement discussions, it is properly within that court's discretion to order a summary jury trial. If negotiations fail after the summary jury trial, the case may proceed to trial.

Lambros, *supra* note 6, at 7–8.

[9] Lambros, *supra* note 6, at 7–8. One legal commentator provides an example:

> Under such a program, if plaintiff's written settlement demand was in the amount of $200,000 and the summary jury trial resulted in a verdict in the amount of $550,000, the defendant would have the option to elect to accept plaintiff's demand of $200,000 to settle the case. Similarly, if the summary jury trial resulted in a verdict for the defendant and defendant's written offer was $50,000, plaintiff would have the option of accepting defendant's offer of $50,000 to settle the case.

judges are encouraged to mold the summary jury process to fit the unique contours and individual needs of a particular case.[10] Generally, a much-abbreviated voir dire is conducted, with both sides making limited for-cause and peremptory challenges.[11] In a typical SJT, a "judge or magistrate presides over the trial. . . . [and] [p]rincipals with authority to settle the case attend."[12] Each lawyer presents a summary of the case to the jury, including opening and closing statements and summaries of witness testimony. Normally, live witness testimony is not presented.[13]

After the evidence has been presented, the judge gives the jury abbreviated instructions on the law.[14] Subsequently, the summary jurors either deliver a consensus verdict and damage recommendations or, if the judge prefers, they render verdicts and damage recommendations individually.[15] The parties and their counsel then have an opportunity to discuss this verdict with the jurors.[16] If the parties cannot settle their dispute following the verdict, the result of the SJT is not admissible in court.[17]

The primary goal of the SJT is to promote settlement. It was designed for cases in which the parties have difficulty reaching a settlement because each

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Terrance M. Miller, *ADR Innovation . . . Summary Jury Trial—Arbitration by a Jury of Your Peers*, INSIDE LITIG., Dec. 1996, at 7 (1996). Of course, parties also retain the right to withdraw from negotiations or change demands or offers.

[10] *See* Lambros, *supra* note 6, at 7.

[11] Sarah Rudolph Cole, *Managerial Litigants? The Overlooked Problems of Party Autonomy in Dispute Resolution*, 51 HASTINGS L. J. 1199, 1211 (2000). Following the Lambros model, usually ten potential jurors are obtained from the regular venire for a modified and abbreviated voir dire. Webber, *supra* note 8, at 1497. "Each juror fills out a questionnaire, which is given to the attorneys before examination. The judge allows each attorney two challenges to the venire, resulting in a six-member jury." *Id.*

[12] Robert Benham & Ansley Boyd Barton, *Alternative Dispute Resolution: Ancient Models Provide Modern Inspiration*, 12 GA. ST. U. L. REV. 623, 650 (1996).

[13] Lambros, *supra* note 6, at 7. If the lawyer chooses to present witness testimony rather than oral argument, he or she should refrain from audio- or video- taping the testimony because if the witness later testifies at trial, the recording could be discoverable by the other side on the theory that it is a prior statement of the witness. Thomas R. Mulroy, Jr. & Andrea B. Friedlander, *Trial Techniques: A Discussion of Summary Jury Trials and the Use of Mock Juries*, 24 TORT & INS. L. J. 563, 568 n.18 (1989).

[14] Webber, *supra* note 8, at 1497.

[15] *Id*; *see also* Jeffrey W. Stempel, *A More Complete Look at Complexity*, 40 ARIZ. L. REV. 781, 802 n.74 (1998) (explaining that, although SJT verdicts are non-binding, jurors are often led to believe the contrary).

[16] JAY E. GRENIG, ALTERNATIVE DISPUTE RESOLUTION WITH FORMS § 2.61 (2d ed. 1997).

[17] Employment Coordinator, Alternative Dispute Resolution, Private "Trials": SUMMARY JURY TRIALS (2001) [hereinafter *Private Trials*].

party either overestimates the strength of his or her own case or underestimates the strength of the other party's case.[18] Summary jury trials "reduce this 'mutual optimism' by providing the parties with more information about the strength of their cases before proceeding to trial."[19] They help to combat parties' naïve realism—their tendency to overestimate the likelihood that unbiased "neutrals" such as jurors will share their viewpoint on the case, and not be persuaded by the apparent "irrationality" of the other party.[20] By listening to the reactions of the summary jurors, the parties can learn about how such unbiased neutrals do in fact perceive the case, and can greatly benefit from discovering any variability in such perceptions. Moreover, SJTs can promote settlement by helping the parties converge in their estimates of the size of jury award that would come about if their case went to trial.[21]

Another feature of SJTs is that they produce the kind of tensions that are present in traditional jury trials. According to Lambros, this tension has two advantages: first, the SJT acts as a dress rehearsal for the real jury trial, and second, the shadow of an approaching trial intensifies the parties' efforts toward settlement. Because the parties are required to attend the SJT, "the procedure is particularly effective where the legal labyrinth begins to tax the patience of the litigants before the 11th hour arrives and provides the parties with a sense of reality while there is still time to do something about it."[22] In addition, SJTs tend to clarify issues at an earlier stage in the dispute

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[18] Webber, *supra* note 8, at 1496.

[19] *Id.*

[20] For a detailed elaboration of the naïve realism concept, see Lee Ross & Andrew Ward, *Naïve Realism in Everyday Life: Implications for Social Conflict and Misunderstanding*, *in* VALUES AND KNOWLEDGE 103 (Edward S. Reed et al. eds., 1996).

[21] *See* Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366, 371 (1986).

> The summary jury trial reduces the gap between the parties' perceived probabilities of the outcome at trial by giving them information (in the form of the summary jury's reactions to the case) that should cause them to adjust their perceptions. Because the information is available to both parties, it should help each to get closer to the true odds, which will usually be somewhere in between the parties' estimates. The summary jury trial may also help the parties converge in their estimates of the size of the judgment if the case goes to trial . . . Narrowing this divergence will make a settlement more likely.

Id.

[22] Lambros, *supra* note 6, at 7. Naturally, parties can always "do something" about it—they can settle at any time.

resolution process, thereby presumably making any subsequent trial more efficient.[23]

Summary jury trials have several advantages over traditional jury trials. One benefit is that they tend to cost the parties less than a traditional trial would.[24] These relative savings arise because SJTs "demand less lawyer time—both in and outside the courtroom—and do not involve the expense of paying expert witness fees."[25] In fact, because the information presented to the jury is in summary form, SJTs often last less than a day.[26] Another benefit of SJTs is that because they are a means to settlement agreement, they can assist litigants in avoiding the "win/lose" outcomes that are typical in traditional litigation and help them to achieve a mutually beneficial solution instead.[27] This feature can help preserve the relationship between the parties.

Summary jury trials appear to be a successful means of promoting settlement. Studies suggest that approximately ninety-five percent of cases tried before summary juries end up settling.[28] Some critics have claimed that this figure is somewhat misleading because studies show that, in fact, over ninety percent of *all* cases settle before trial.[29] However, the sole *experimental* study on SJTs published to-date suggests that they may in fact lead to a higher settlement rate than cases that do not undergo ADR.[30] This study randomly assigned civil cases filed in 1993 in Ramsey County, Minnesota, to either a control group of cases that were designated as ineligible for ADR, an experimental group of cases eligible for mediation-

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[23] *Id.*

[24] Except in cases where they fail to help the parties reach a settlement, and consequently, form an "additional layer of expense" beyond the costs of a traditional jury trial. *See* Ann E. Woodley, *Strengthening the Summary Jury Trial: A Proposal to Increase Its Effectiveness and Encourage Uniformity in Its Use*, 12 OHIO ST. J. ON DISP. RESOL. 541, 571 (1997).

[25] Mulroy & Friedlander, *supra* note 13, at 564. One study disclosed that over eighty-two percent of the SJT cases in the Northern District of Ohio were resolved more quickly than the average of comparable cases that were not assigned to SJTs. Lambros, *supra* note 6, at 8.

[26] Lambros, *supra* note 6, at 8.

[27] *Id.*

[28] *Private Trials*, *supra* note 17.

[29] *See, e.g.*, William W. Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703, 707–08 (1989) (finding that "[a]bout ninety-five percent of the civil cases filed in federal courts are terminated before trial").

[30] John S. Connolly, *A Dose of Social Science: Support for the Use of Summary Jury Trials as a Form of Alternative Dispute Resolution*, 25 WM. MITCHELL L. REV. 1419, 1430 (1999).

arbitration ("med-arb"),[31] or a second experimental group of cases eligible for a SJT. [32] Cases were selected "from the major civil cases that were filed and placed on a 'standard' case track."[33] Results of the study indicated that 4.1% of the med-arb cases and 10% of the control cases went to full trial, whereas only 3.6% of SJT cases did so. [34] Although this study did not provide evidence that SJTs produce significantly higher settlement rates than med-arb, the settlement rates for cases undergoing SJTs did appear higher than rates for cases that did not undergo ADR at all.

II. OVERVIEW OF RELEVANT PSYCHOLOGICAL RESEARCH

A. *Predicting Traditional Jury Trial Decisions*

Legal academics have suggested that SJTs encourage settlement primarily because of their signature feature: the use of a jury. As one such commentator has argued, "[t]he theory underlying the [SJT] is that parties, following pre-trial discovery and conference, will be more inclined to settle their dispute if they receive a *jury* evaluation of the strengths and weaknesses of their claims and defenses."[35] Litigants are presumably more likely to accept the case valuations of summary jurors than those of their attorneys or qualified neutrals.[36] Those who advocate SJTs claim that the use of a summary jury allows the litigants to actually *predict* how a traditional jury *would* decide their case.[37] One study found that sixty-four percent of state

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[31] *Id.* at 1430–31. "Med-Arb" is "a hybrid of mediation and arbitration in which the parties initially mediate their disputes; but if they reach impasse, they arbitrate the deadlocked issues." *Id.* at 1423 n.14.

[32] *Id.* at 1430–31.

[33] *Id.* ("Case assignment continued until roughly 100 cases were assigned to each group—control, mediation/arbitration, or SJT. Cases were not allowed out of the [group] to which they were assigned.").

[34] *Id.* at 1431.

[35] Cole, *supra* note 11, at 1210 (emphasis added).

[36] Connolly, *supra* note 30, at 1448. The intuition among lawyers is that "[p]laintiffs accept jury verdicts better than [they accept] advice of counsel." Anne-Marie Thompson, *Summary Jury Trials are Being used to Produce Economical Justice by Stimulating More Settlements*, P. LAW., Nov./Dec., at 31, 32 (1996).

[37] *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution*, 103 F.R.D. 461, 463 (1984) [hereinafter *Alternative Methods*]; *see also* Irving R. Kaufman, *Reform for a System in Crisis: Alternative Dispute Resolution in the Federal Courts*, 59 FORDHAM L. REV. 1, 14–15 (1990); William D. Underwood, *Divergence in the Age of Cost and Delay Reduction: The Texas Experience with Federal Civil Justice Reform*, 25 TEX. TECH. L. REV. 261, 313 (1994). As Lambros has stated:

court lawyers and fifty-three percent of federal court lawyers believe that SJT verdicts reflect actual traditional trial outcomes.[38] In fact, some commentators have gone as far as to claim that the verdict of a summary jury can serve as a "crystal ball" that parties can rely on to "predict, with a reasonable amount of certainty, what a jury would do" at trial for that case.[39]

Some legal practitioners and academics, however, have questioned the effectiveness of the SJT as a "predictor." As Robert Bradford has pointed out, several real-life examples cast doubt on the SJT's ability to predict traditional jury trial outcomes:

> [In a case from Minnesota] two panels of six people each heard the same SJT presentation. One panel found for the defendants; the second panel returned a $2.292 million "verdict" for the plaintiff. Similarly, in [a case that went before the Sixth Circuit], an SJT resulted in a $200,000 "verdict" for the plaintiff. The regular jury at trial returned a verdict in the amount of $1.7 million.[40]

Others argue that SJTs are problematic as predictors because of "the abbreviated nature of the parties' presentations."[41] Problems might also arise when "strategizing" lawyers withhold critical information during the SJT in order to retain an element of surprise for the real trial.[42] Moreover, because objections are generally not allowed, summary juries may hear evidence that would be inadmissible at trial.[43] Studies have not yet experimentally

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> Every time a case is prepared for litigation, a trial lawyer is faced with the imponderable task of attempting to predict the outcome of a jury trial. Clients desire to know what the outcome will be prior to trial and, thus, an attorney must venture a guess to determine whether to advise their clients to settle or to risk a trial. The evaluation process was too subjective. As professionals, we have been in need of something more objective for measuring outcomes. . . . The summary jury trial was intended as a step towards achieving objectivity in case evaluation.

Lambros, *supra* note 2, at 621. Summary jury trials were developed to help counsel more accurately predict the outcome or values of cases before the case went to trial. *Id.* at 622.

[38] *See* James J. Alfini, *Summary Jury Trials in State and Federal Courts: A Comparative Analysis of the Perceptions of Participating Lawyers*, 4 OHIO ST. J. ON DISP. RESOL. 213, 228 (1989), *cited in In re* S. Ohio Corr. Facility, 166 F.R.D. 391, 394 (S.D. Ohio 1996).

[39] *Alternative Methods*, *supra* note 37, at 463.

[40] Robert W. Bradford, Jr., *The Mini-Trial and Summary Jury Trial*, 52 ALA. LAW. 150, 155 (1991).

[41] Mulroy & Friedlander, *supra* note 13, at 565.

[42] *See* Marla Moore, *Mandatory Summary Jury Trials: Too Hasty a Solution to the Growing Problem of Judicial Inefficiency?*, 14 REV. LITIG. 495, 498 (1995).

[43] *See id.*

confirmed the magnitude of these potential problems by examining how SJT results compare to traditional jury outcomes.[44] It is reasonable to assume, however, that summary juries will offer insight about the responses to be expected from a traditional jury only insofar as the evidence presented at a SJT is truly representative of what would be used at trial.

Beyond these anecdotes and intuitions about differences with respect to presentation and matters of evidence, however, jury psychology research suggests that certain structural features of SJTs hinder their ability to reliably predict traditional jury decisions. Three structural features are of particular relevance: small sample size, the absence of group deliberation, and non-correspondent jury size. Fortunately, each of these features can be modified. This Part will review each feature in turn and will discuss how courts that use SJTs can apply psychological research to develop ones that better approximate traditional juries, and therefore, better predict jury outcomes.

B. *The Need for Multiple Summary Juries*

One problematic aspect of SJTs is that they often rely on the opinions of a *single* summary jury to predict what another single traditional jury would decide.[45] Using a single observation as a basis for understanding a phenomenon is akin to relying on a case study or, in other words, a sample of one. The perils of using case studies for generalization or prediction have been well identified by research psychologists.[46] Quite simply, in order to make a reliable prediction, data from multiple samples from the same representative population must be examined. Beyond the issue of reliable predictions, another benefit of using multiple summary juries is that doing so provides a hint as to the *variability* in perceptions on the case. The level of

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[44] As per Westlaw and Internet searches, ending in May 2002.

[45] Very few judges report using multiple panels. "Judge Lambros used two jury panels to ascertain areas of consistency in the verdicts and to determine whether asbestos cases would follow a particular pattern." Molly M. McNamara, *Summary Jury Trials: Is There Authority for Federal Judges to Impanel Summary Jurors?*, 27 VAL. U. L. REV. 461, 469 n.60 (1993) (citing Judicial Conference of the Sixth Circuit of the United States, The Summary Jury Trial, May 16, 1985, app. A addendum I at 5). "Judge Enslen used two panels of six jurors in the groundwater contamination SJT." *Id.* (citing Hon. Richard A. Enslen, *Federal Judge Says Summary Jury Trials Can Help Settlement in Toxic Tort Cases*, *in* ALTERNATIVE DISPUTE RESOLUTION: PRACTICE AND PERSPECTIVE 105 (Martha A. Matthews ed., 1990)).

[46] *See, e.g.*, CAROLE WADE & CAROL TAVRIS, PSYCHOLOGY 40 (1998); Amos Tversky & Daniel Kahneman, *Belief in the Law of Small Numbers*, 76 PSYCHOL. BULL. 105–10 (1971).

variability in jury opinions about liability and damage awards can provide the litigants with an important indicator about the risk involved in going to trial.

Moreover, psychological research on jury decisions offers another reason for not relying on a single summary jury to predict a traditional trial outcome: studies have shown that when evidence in a case is equivocal, the unique personalities and biases of the jurors deciding the case are especially likely to impact jury outcomes.[47] When the strength of evidence in a case is balanced across both sides of the dispute, "extralegal" factors such as biases become more heuristically useful in the decision-making process and are therefore likely to impact jury decisions.[48] The problem with SJTs is that parties who participate in one may not know in advance of the procedure that the evidence in their case is equivocal. Thus, the parties may end up with a summary jury verdict that they believe reflects the relative weight of the evidence when, in fact, it is more a function of the personal attributes of those who happen to have served on that summary jury. The parties in such cases would not know that the weight of the evidence favors both parties about equally, and the settlement terms might (unjustly) reflect this error.

A modest and practical solution to the problems associated with relying on data from a single summary jury would be to use multiple summary juries for each case. Although it might not be feasible to require the number of juries that a research psychologist would use for the purposes of conducting publishable research, one could nevertheless achieve more reliable data for a SJT by assembling the equivalent of eight or nine juries worth of individuals to attend the same SJT sessions, and then grouping them into separate juries for the purposes of deliberations. By conducting statistical analyses on the data obtained from such a series of jury panels, a research psychologist, statistician or similar expert could provide a mathematical estimate of the expected outcome on the issues of liability and damages.[49] This procedure would reduce the risk that the parties will rest their settlement decisions on data from an aberrational summary jury. Moreover, using multiple panels might even elevate the settlement rate following SJTs, since, for example, it would be harder for reluctant parties to rationalize seven out of eight

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[47] For a good discussion on this point, see generally Robert J. MacCoun, *The Emergence of Extralegal Bias During Jury Deliberation*, 17 CRIM. JUST. & BEHAV. 303 (1990).

[48] They are "extralegal" in that they are based on factors which are logically irrelevant to the determination of guilt or liability in the cases in which they are manipulated. Barbara F. Reskin & Christy A. Visher, *The Impacts of Evidence and Extralegal Factors in Jurors' Decisions*, 20 LAW & SOC'Y REV. 423, 430–31 (1986).

[49] Robert Gordon, *Summary Jury Trial: The Key to Unlocking Litigation Gridlock*, 4 No. 10 MED. LEGAL ASPECTS BREAST IMPLANTS 3, at 4 (1996).

summary jury verdicts against them than it would be for them to ignore a single unfavorable summary verdict.

C. *The Need for Group Deliberation*

Another problem with summary juries arises when judges ask jurors to render verdicts and damage recommendations individually rather than as a group that has reached a consensus.[50] This approach seems to reflect the belief that groups are merely a sum of their parts and, consequently, that the verdict of a traditional jury can be predicted from the individual attitudes of summary jurors. Although some research suggests that there can be a strong relationship between the individual-level pre-deliberation distribution of verdict preferences and a deliberating jury's verdict,[51] several decades of research on jury decision-making make clear the folly of relying solely on individual opinions to predict group verdicts.[52] As one psychologist stated

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[50] Webber, *supra* note 8, at 1497; *see also* AM. L. PROD. LIAB. 3D PRAC. AIDS § 654 (2001) (outlining that jurors can return "either a consensus verdict or a special verdict consisting of an anonymous statement of each juror's findings on liability and/or damages" in asbestos liability suits).

[51] HARRY KALVEN JR. & HANS ZEISEL, THE AMERICAN JURY 487–90 (1966) (demonstrating that the first ballot is a strong predictor of jury verdicts); David Schkade et al., *Empirical Study: Deliberating About Dollars: The Severity Shift*, 100 COLUM. L. REV. 1139, 1153 (2000) (demonstrating that "[w]hen a majority of juror judgments (*i.e.* [sic], four or more) are 0, the jury verdict is virtually certain to itself be 0. When a majority of jurors have non-zero judgments, the jury verdict is virtually certain not to be 0. Finally, if the jury is evenly split, the chance of a 0 verdict is about 50-50.").

[52] *See, e.g.*, CURT R. BARTOL & ANNE M. BARTOL, PSYCHOLOGY AND LAW: RESEARCH AND APPLICATION 208–09 (1994) (discussing situations in which individual case evaluations differ from group verdicts); Richard R. Izzett & Walter Leginski, *Group Discussion and the Influence of Defendant Characteristics in a Simulated Jury Setting*, 93 J. SOC. PSYCHOL. 271, 275–76 (1974) (finding that individual mock jurors assigned "unattractive" defendants a significantly more lenient sentence than they did before the group discussion); Schkade, *supra* note 51 (concluding, from a study of over 3000 adults deliberating in mock juries, that the median dollar awards of a group of individuals prior to deliberation are poor predictors of that group's collective verdict following deliberations); Donna Shestowsky, Duane T. Wegener & Leandre R. Fabrigar, *Need for Cognition and Interpersonal Influence: Individual Differences in Impact on Dyadic Decisions*, 74 J. PERSONALITY & SOC. PSYCHOL. 1317, 1322 (1998) (finding that the individual-level predeliberation opinions of low need for cognition individuals did not predict dyadic deliberation outcomes). For a review, see Wayne Weiten & Shari Seidman Diamond, *A Critical Review of the Jury Simulation Paradigm*, 3 LAW & HUMAN BEHAV. 71, 78–79 (1979) (arguing that "[t]here are ample data available from several research traditions in social psychology that indicate that individual and group decisions represent fundamentally different phenomena" and reviewing relevant findings).

aptly: "It is not clear whether we can even meaningfully speak of simulated jurors without employing a group deliberation. Investigations of these individual phenomena would be more appropriately referred to as studies of individual judgment rather than of simulated jurors."[53]

Perhaps the strongest empirical evidence demonstrating why individual opinions should not be used as the sole predictor of group decisions stems from research on juror bias. In recent decades, researchers have used the mock jury experimental paradigm to demonstrate that a variety of defendant and attorney characteristics (*e.g.*, gender, race, and physical attractiveness) can prejudice jurors' judgments.[54] Some research has shown that biases found in individual judgments can be attenuated by the deliberation process, and that judgments tend to polarize in the direction favored by the evidence. A mock jury experiment by Kaplan and Miller, for example, manipulated the relative strength of the evidence as well as the degree of an extralegal variable: the obnoxiousness of various trial participants.[55] The researchers manipulated obnoxiousness by having mock lawyers and judges ask redundant and irrelevant questions, discuss obscure points of law, or interrupt the trial for a phone call.[56] Although the obnoxiousness manipulations significantly biased pre-deliberation guilt ratings, post-deliberation ratings shifted in the direction of the initial strength of the evidence and were no longer influenced by the extralegal variable.[57] Similarly, when Kerwin and Shaffer investigated the biasing effects of inadmissible testimony they found that "deliberations virtually eliminated [this kind of] bias among juries."[58] In particular, their study showed that mock jurors who responded to a case by deliberating and rendering a group verdict were more likely to follow judicial instructions to ignore inadmissible testimony than mock jurors who responded to the case by indicating individual opinions only.[59] Conversely,

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[53] Robert D. Foss, *Group Decision Processes in the Simulated Trial Jury*, 39 SOCIOMETRY 305, 305 n.1 (1976).

[54] MacCoun, *supra* note 47, at 303.

[55] *See generally* Martin F. Kaplan & Lynn E. Miller, *Reducing the Effects of Juror Bias*, 36 J. PERSONALITY & SOC. PSYCHOL. 1443 (1978) (third reported experiment found extralegal sources of obnoxiousness having less influence on group verdicts than on individual predeliberation judgments). When the weight of evidence does not clearly favor one party over the other, it is especially perilous to attempt to predict jury outcomes without relying on group-level data. *See generally supra* notes 46–47.

[56] Kaplan & Miller, *supra* note 55, at 1451.

[57] *Id.*

[58] Jeffrey Kerwin & David R. Shaffer, *Mock Jurors Versus Mock Juries: The Role of Deliberations in Reactions to Inadmissible Testimony*, 20 PERSONALITY & SOC. PSYCHOL. BULL. 153, 160 (1994).

[59] *Id.* at 159.

research by MacCoun and Kerr found that deliberations can sometimes augment biases—they found evidence of a leniency bias that emerged during group deliberations but not among participants who indicated individual opinions in the absence of deliberations.[60] Together, these findings on bias present a clear picture with respect to jury decisions: to understand *jury* decisions one cannot rely on *individual* judgments alone. Rather, one must study juries qua juries.

Certainly, individual-level data have some utility for understanding jury behavior. Such data can, for example, be valuable for generally assessing the strengths and weaknesses of a case from a layperson's perspective, or for determining whether or not laypeople might vary in their opinions of which party should prevail. Moreover, research has shown that the median of individual liability ratings for cases does tend to correspond to how deliberating juries decide those same cases with respect to liability.[61] Importantly, however, individual-level data on damages tend to be very poor predictors of jury *awards*.[62] Thus, whereas individual-level judgments might be useful for predicting which party is apt to win or lose a case, they are not reliable for predicting jury damages. Without an additional award predictor, data from a summary jury on the issue of liability, even if reliable, would not be sufficient for the purposes of arriving at a settlement agreement with respect to a dollar award because a verdict of "liable" can correspond to damages anywhere from one dollar, to some seemingly infinite amount. Thus, although individual-level data can be valuable, these kinds of data should be obtained in addition to, not instead of, group verdicts.

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[60] Robert J. MacCoun & Norbert L. Kerr, *Asymmetric Influence in Mock Jury Deliberation: Jurors' Bias for Leniency*, 54 J. PERSONALITY & SOC. PSYCHOL. 21, 26–31 (1988) (experiment 2); *see also* MacCoun, *supra* note 47, at 303–14 (1990) (finding that when trial evidence was equivocal, jury decisions following deliberations were more lenient when the defendant was attractive than when the defendant was unattractive, suggesting a bias based on physical appearance which was exacerbated by the deliberation process); Valerie P. Hans & Anthony N. Doob, *Section 12 of the Canada Evidence Act and the Deliberations of Simulated Juries*, 18 CRIM. L. Q., 235, 242 (1976) (finding that inadmissible evidence influenced the verdicts of deliberating groups, but not those of individual mock jurors).

[61] Schkade, *supra* note 51, at 1153.

[62] *See id.* (demonstrating that the median dollar awards of a group of individuals prior to deliberation are poor predictors of that group's collective damage award following deliberations).

D. *The Need for Correspondent Jury Size*

A third problem that interferes with the ability of SJTs to predict traditional jury outcomes arises when the size of a summary jury does not match the size of the jury that would be impaneled for that case in a traditional trial. Although most SJTs do impanel six jurors per jury, [63] which would result in a match for most traditional civil juries, some judges impanel fewer. For example, Judge John McNaught, U.S. District Court for the District of Massachusetts, uses a five-person jury to ensure that the jury will not return a tie verdict.[64] Other federal judges have convened SJTs with only three jurors.[65] Therefore, even though traditional juries are very rarely composed of fewer than six jurors,[66] summary juries sometimes are.

Psychological research strongly suggests that this "mismatch" in terms of jury size can greatly hinder the SJT's ability to approximate the decisions of traditional juries. Many studies have shown that when larger juries are compared empirically to smaller juries, significant differences emerge. Research has found, for example, that six-person juries tend to produce more divergent (*i.e.*, both higher and lower) damage judgments than twelve-person juries even when the number of pro-plaintiff and pro-defendant verdicts is roughly equivalent.[67] Research has also shown that reducing group size

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[63] *See* Woodley, *supra* note 24, at 572–73; Ponte *supra* note 8, at 1069 n.57; D. MASS. R. 16.4(C)(3)(b) ("There shall be six jurors on the panel, unless the parties agree otherwise."); N.D. OHIO R. 16:8 (c)(5) ("Size of Jury Panel. Usually the jury shall consist of six (6) jurors.").

[64] McNamara, *supra* note 45, at 469 n.60.

[65] DORIS MARIE PROVINE, SETTLEMENT STRATEGIES FOR FEDERAL DISTRICT JUDGES 73 n.184 (Federal Judicial Center 1986).

[66] Ballew v. Georgia, 435 U.S. 223, 236–45 (1978) (ruling that criminal juries of less than six members violate the Sixth Amendment's representative requirement); FED. R. CIV. P. 48 (which provides for juries "of not fewer than six and not more than twelve members" for civil trials and allows juries of less than six only when the parties so stipulate).

[67] *See, e.g.*, James H. Davis et al., *Effects of Group Size and Procedural Influence on Consensual Judgments of Quantity: The Example of Damage Awards and Mock Civil Juries*, 73 J. PERSONALITY & SOC. PSYCHOL. 703, 710–14 (1997) (finding that six-person juries take less time to reach a verdict and award larger damages than twelve-person juries but are also more variable in their awards); Dana Richard Katnik, *Statistical Analysis and Jury Size: Ballew v. State of Georgia*, 56 DENV. L. J. 659, 670–71 (1979). Not all research corroborates these findings. One study, for example, showed that twelve- and six-member simulated juries did not differ significantly in terms of final group decisions. B.A. Eakin, *An Empirical Study of the Effect of Leadership Influence on Decision Outcomes in Different Sized Jury Panels*, 11 KANSAS J. SOCIOLOGY 109 (1975).

increases the likelihood that the group will reach consensus (*i.e.*, not hang).[68] Consequently, if reasonable jurors could differ in their evaluations of a given case—a fact that would be useful for litigants who are considering settlement to know—this information is less likely to surface from smaller juries. A consensus that emerges from a small jury in such a case may be due to its small size rather than because the evidence clearly favors one party.[69] Consequently, parties who observe a summary jury reaching a unanimous decision rather than hanging (as a larger jury might do for the same case) might erroneously believe that the evidence clearly supports one party. In such cases, this faulty conclusion might encourage the "losing" party to settle. Although settlement is a primary purpose of SJTs, settlement under such false pretenses is certainly less than ideal.

Although research comparing jury sizes has focused on differences between juries of six and juries of twelve, these empirical studies are nevertheless useful for comparing summary juries of five or fewer with juries of six. The idea that the quality of decision processes or verdicts of five-person juries might substantially differ from those of six-person juries was accepted by the Supreme Court in *Ballew v. Georgia*,[70] in which the Court held that the minimum acceptable jury size for criminal trials was six. Even though most of the research reviewed in *Ballew* contrasted six-person juries with twelve-person juries, the Court recognized that significant differences would exist between juries of five as compared to juries of six. The Court reasoned that juries of less than six would be less likely to engage in effective group deliberation and less able to produce accurate results.[71] For example, the Court stated that:

> Generally, a positive correlation exists between group size and the quality of both group performance and group productivity. A variety of explanations have been offered for this conclusion. Several are particularly

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[68] *See* LAWRENCE S. WRIGHTSMAN ET. AL., PSYCHOLOGY AND THE LEGAL SYSTEM 409–10 (4th ed. 1998) (reviewing the relevant literature); Michael J. Saks & Mollie Weigher Marti, *A Meta-Analysis of the Effects of Jury Size*, 21 LAW & HUMAN BEHAV. 451, 459–60 (1997) (reviewing the relevant literature and concluding that 12-person juries hang less often than six-person juries).

[69] *See* Tversky & Kahneman, *supra* note 46, at 105–10. The probability of getting three people on a jury with the same viewpoint on the case is much easier than getting six people with the same viewpoint. This is true according to the laws of chance and probability alone, and can occur regardless of the strength of evidence that is presented.

[70] *Ballew*, 435 U.S. at 236–45.

[71] *Id.* at 235 (reviewing psychological studies and concluding that psychological research raises "significant doubts about the consistency and reliability of the decisions of smaller juries").

> applicable in the jury setting. The smaller the group, the less likely are members to make critical contributions necessary for the solution of a given problem. Because . . . memory is important for accurate jury deliberations [as] juries decrease in size . . . they are less likely to have members who remember each of the important pieces of evidence or argument.[72]

To accurately approximate traditional jury outcomes, a summary jury should not be smaller in size than the jury that would be used if the case were to go to trial. If the jury is smaller, the case assessments resulting from the SJT might provide a faulty basis on which litigants might base their settlement decisions.

Clearly, those who support SJTs have assumed that they are reliable predictors of traditional jury outcomes.[73] However, empirical research on jury psychology suggests that these assumptions are suspect. To maximize effectiveness in regards to prediction, SJTs should use multiple summary juries, composed of the same number of jurors that would be empanelled on a traditional jury in that jurisdiction, for that type of trial. Moreover, the researchers should not simply calculate averages using the responses of individual jurors; one should oblige the jurors to arrive at a group verdict through deliberation. These insights from psychological research challenge the intuition that SJTs in their current form can serve as "crystal balls" for predicting what would happen in a traditional trial.

III. THE TREATMENT OF SUMMARY JURORS

Summary juries and the mock juries used by psychological researchers share many similarities. Both are composed of lay citizens. Both expose participants to a legal case and then gather data about their perceptions of the case. Both summary juries and mock juries are used to test hypotheses—litigants use summary juries to test hypotheses about the value and possible success of their case; research psychologists use their participants to test their hypotheses about jury behavior. Summary jurors and mock jurors also both make non-binding decisions.

Despite the similarity between the two procedures, SJT administrators treat their "participants" very differently from the way that psychologists treat theirs. These differences are due in large part to the ethics code of the

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[72] *Id.* at 232–33.

[73] *See generally supra* notes 34–37.

American Psychological Association (APA).[74] Under APA guidelines, psychologists are required to obtain informed consent from their participants.[75] They also adhere to strict rules about deceiving participants.[76] Violations of the ethics code are brought before the APA Standing Hearing Panel, a hearing before which may result in reprimand, censure or expulsion from the Association.[77] Many criticisms of the SJT can be succinctly summarized by an analogy to psychological research and the corresponding failure of courts to treat summary jurors with the degree of consideration and respect that the APA requires of psychological researchers. These criticisms would lose much of their force if those who organize SJTs treated summary jurors more like psychologists treat their participants. This Part of the Article addresses the problems with, and the solutions for, the two main criticisms regarding the treatment of summary jurors: the use of deception and the lack of informed consent.

A. *Deception*

Jurors are often misled as to their roles in SJTs.[78] Although their verdicts are non-binding, jurors are usually led to believe the contrary.[79] Because legal administrators believe that prospective "jurors who learn that their decision is merely advisory will not be properly motivated to reach a just and fair result, and, instead, will substitute compromise and time-saving devices

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[74] *See generally* AMERICAN PSYCHOLOGICAL ASSOCIATION, ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT (1992), *available at* http://www.apa.org/ethics/code.html.

[75] AMERICAN PSYCHOLOGICAL ASSOCIATION, ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT 6.11 *Informed Consent to Research* (1992), *available at* http://www.apa.org/ethics/code1992.html#6.11. Under the informed consent requirement, researchers obtain consent that is voluntarily provided by participants who decide to participate in a study or task after being told what will be involved in participation. ELIOT R. SMITH & DIANE M. MACKIE, SOCIAL PSYCHOLOGY 58 (1995).

[76] AMERICAN PSYCHOLOGICAL ASSOCIATION, ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT 6.15 *Informed Consent to Research* (1992), *available at* http://www.apa.org/ethics/code1992.html#6.15.

[77] AMERICAN PSYCHOLOGICAL ASSOCIATION, ETHICS COMMITTEE RULES AND PROCEDURES, *available at* http://www.apa.org/ethics/rules.html.

[78] JAY E. GRENIG, ALTERNATIVE DISPUTE RESOLUTION WITH FORMS §§ 2.61 *Summary Jury Trials* (2d ed. Supp. 2001).

[79] Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366, 372 (1986); Jeffrey W. Stempel, *A More Complete Look at Complexity*, 40 ARIZ. L. REV. 781, 802 n.74 (1998).

for conscientious deliberation,"[80] they typically do not inform summary jurors of the advisory nature of their role until after they have returned their verdicts.

Summary jury trials are sharply criticized for not informing jurors about the advisory nature of their decisions. The critique is two-fold. First, not informing summary jurors that their decisions are non-binding can be detrimental to the summary jurors themselves because it may cause them unnecessary stress. Avern Cohn, United States District Judge for the Eastern District of Michigan, has documented the discomfort some summary jurors have felt as a result of their participation, which includes sleep disturbances and the type of anxiety that results from making one's own major life decisions.[81] One juror even reported that the decisions she made on the jury were among the "most difficult of her life." [82] Although these kinds of negative consequences can result from participation in traditional trials as well, when they do result from traditional trials they are not caused in part by state-sanctioned deception. The same cannot be said for SJTs.

Avoiding negative consequences for participants is a chief concern of research psychologists. The APA requires that psychologists minimize the use of deception in research.[83] Specifically, the APA's ethical rules state that:

> Psychologists do not conduct a study involving deception unless they have determined that the use of deceptive techniques is justified by the study's prospective scientific, educational, or applied value and that equally effective alternative procedures that do not use deception are not feasible . . . . Psychologists never deceive research participants about significant aspects that would affect their willingness to participate, such as physical risks, discomfort, or unpleasant emotional experiences.[84]

Under some circumstances, testing a hypothesis can be accomplished only if psychologists do not disclose certain aspects of the research to prospective participants. Psychologists might engage in deceptive practices when they need to combat demand characteristics and social desirability biases while gathering information about socially important topics.[85] For

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[80] Bobby Marzine Harges, *The Promise of the Mandatory Summary Jury Trial*, 63 TEMP. L. REV. 799, 809 (1990); *see also* Mulroy & Friedlander, *supra* note 13, at 564 (explaining that the jury is not told that their verdict is advisory until after the it has returned).

[81] Avern Cohn, *Summary Jury Trial—A Caution*, 1995 J. DISP. RESOL. 299, 300.

[82] *Id.*

[83] AMERICAN PSYCHOLOGICAL ASSOCIATION, *supra* note 77.

[84] *Id.*

[85] SMITH & MACKIE, *supra* note 75, at 59.

example, if a researcher told his or her research participants that the study they were about to take part in concerned how racial prejudice affects reactions to requests for help, people might be unable, even with the best of intentions, to prevent their knowledge of the topic from affecting how they react to such requests.[86] In such cases, informing participants of the true nature of the study would invalidate the research findings. According to the APA, the basic test for determining whether deception is acceptable is whether the ends justify the means.[87] Psychologists tend to be "willing to use deception as a last resort when they judge the research topic to be highly important and when no other alternatives are feasible."[88]

The "ends" sought by SJTs—obtaining a decision resulting from deliberation that is as serious as one would expect from a traditional jury trial—do not justify the "means" of misleading the jurors as to the nature of their advisory role. As discussed earlier, some legal commentators believe that deception is necessary in order to obtain decisions that accurately approximate those of traditional jurors who know they are making a binding decision.[89] This argument rests on the assumption that individuals mandated to make a decision that they believe will have real consequences for third parties are more motivated in their decision-making processes, and make different decisions, than individuals who know they are participating in a simulation.

Several studies have found differences between decisions made under "real" and simulated, or "hypothetical consequence," conditions. For example, in a study by Wilson and Donnerstein, "real consequence" participants were led to believe that their judgments would actually determine what happened to the defendant, while "hypothetical consequence" participants believed they were involved in a typical jury decision-making study.[90] They found that the attractiveness of the defendant's personality did not affect the guilt judgments by "real consequence" participants, but it did affect judgments by "hypothetical consequence" participants.[91] They also found that, compared to "hypothetical

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[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] *See* James J. Alfini, *Summary Jury Trials in State and Federal Courts: A Comparative Analysis of the Perceptions of Participating Lawyers*, 4 OHIO ST. J. ON DISP. RESOL. 213, 217 (1989) (reporting a comparison study of SJT use in Florida state and federal program).

[90] David W. Wilson & Edward Donnerstein, *Guilty or Not Guilty? A Look at the "Simulated" Jury Paradigm*, 7 J. APPLIED SOC. PSYCHOL. 175, 175 (1977).

[91] *Id.* at 181–82.

consequence" participants, "real consequence" participants recalled more evidence and were more likely to find the defendant guilty.[92] Several other studies also found some significant differences between "real consequence" and "hypothetical consequence" juror judgments.[93] Although such results may appear to support the idea that jurors' perceptions of decision consequences can significantly impact jury verdicts, one important aspect of these studies' methods prevents this conclusion: the research participants did not deliberate.[94] Consequently, such research provides little insight into

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[92] *Id.* at 185.

[93] In one study, participants were told that the department chairman wanted to get student input regarding the appropriate disciplinary action for a specific case of plagiarism. David Suggs & John J. Berman, *Factors Affecting Testimony about Mitigating Circumstance and the Fixing of Punishment*, 3 LAW & HUM. BEHAV. 251, 255 (1979). Participants were told that there was no guarantee that the student opinions would be the deciding factor but were assured that their viewpoints would be carefully considered. *Id.* at 254–55. Collapsing across all other manipulated variables (*i.e.*, presence of mitigating testimony, source of the testimony, and credibility of the source), no differences between the "no consequence" and "some consequence" conditions were found for either of the main variables of interest—penalty or appraisal of penalty severity. *Id.* at 257. But they did find that the pattern of results for some of these variables (*i.e.*, presence of mitigating testimony, source of the testimony, and credibility of the source) was affected by the consequence manipulation: namely, participants who thought their decisions were of real consequence gave less severe penalties when mitigating evidence was presented as opposed to when it was not. *Id.* at 258. Moreover, among participants whose decisions had no real consequence, none of these variables produced any reliable difference. *Id.* In another study, students were either led to believe that their judgments were real and binding or were told they would be participating in a simulation. Martin F. Kaplan & Sharon Krupa, *Severe Penalties Under the Control of Others Can Reduce Guilt Verdicts*, 10 LAW & PSYCHOL. REV. 1, 3 (1986). They were asked by a professor to provide guidance on a case concerning a fellow student who was suspected of cheating. *Id.* at 7. They were told that the majority vote on the student's guilt would be honored by the department. *Id.* This study found that the consequence manipulations had no effect on convictions when evidence was highly incriminating, but that it did have an effect when evidence was mildly incriminating. *Id.* at 8. In particular, real consequence participants were more likely to convict and were more certain of the defendant's guilt. *Id.*

[94] To my knowledge, only three studies that examined differences between "real consequence" and "hypothetical consequence" judgments included deliberations. One study found no differences between the proportion of first-ballot guilty votes in real juries (whose decisions carried real consequences for the litigants) and shadow juries composed of individuals who had been excused during voir dire for the same cases (whose decisions clearly carried no real consequences). Hans Zeisel & Shari Seidman Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court*, 30 STAN. L. REV. 491, 512–13 (1978). The study did not provide comparisons of group verdicts, however, and thus has little utility for clarifying how differences in

whether summary jurors who deliberate might behave differently if they were told that their decisions would be advisory in nature as opposed to being led to believe that they would have real consequences for the parties.[95]

By contrast, research that has included group deliberations suggests that mock jurors take their advisory role quite seriously even when they know that their decisions will not be binding on a real litigant.[96] For example, Kerr and his colleagues found that individual predeliberation opinions and sentences, group verdicts, deliberation time, number of polls, and individual juror's memory for case-related facts and their criteria for reasonable doubt were not significantly affected by their role manipulation.[97] Moreover, an

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perceived decision consequences affect group outcomes. A second study found differences between actual trial outcomes and individual mock juror judgments of the same case. Gordon Bermant, et al., *The Logic of Simulation in Jury Research*, 1 CRIM. JUST. & BEHAV. 224, 229–311 (1974). It too did not report analyses at the group-level, and therefore provides very limited information about the behavior of juries. A third study, which did report group-level analyses, compared mock jurors (led to believe they were participating in a psychological experiment) and "actual" jurors (led to believe they were helping to decide a real case for a university committee on student discipline). Norbert Kerr, David R. Nerenz & David Herrick, *Role Playing and the Study of Jury Behavior*, 7 SOC. METHODS & RES. 337, 343 (1979). This study found no significant differences between the "actual" and mock jurors or juries with respect to group verdicts, sentence recommendations, deliberation duration, or the decision schemes used during deliberations. *Id.* at 351.

[95] *See supra* Part II (discussing the importance of including deliberations in research that aims at predicting jury decisions).

[96] REID HASTIE ET AL., INSIDE THE JURY 37–58 (1983) (arguing that experiments using mock juries can be made sufficiently realistic to yield reliable predictions about the behavior of real juries); Ponte *supra* note 8, at 1084 n.114.

> Several studies have examined the level of emotional involvement of mock jurors who are aware of the hypothetical nature of their deliberations. The studies report that mock jury verdicts may be highly predictive of actual trial verdicts and that mock jurors show a high degree of emotional involvement in their work.

Id. (quoting Bobby M. Harges, *The Promise of the Mandatory Summary Jury Trial*, 63 TEMP. L. REV. 799, 809 (1990)); *see also* Shari Seidman Diamond, *Illuminations and Shadows from Jury Simulations*, 21 LAW & HUM. BEHAV. 561, 567 (1997) (reviewing research suggesting that concerns about differences in motivation between "real" and simulated juries may be overstated because factors that affect decision-making are not always affected by motivation levels); *supra* note 94.

[97] Norbert L. Kerr et al., *Role-Playing and the Study of Jury Behavior*, 7 SOC. METHODS & RES. 337, 350–52 (1979). *But see* Wayne Weiten & Shari Seidman Diamond, *A Critical Review of the Jury Simulation Paradigm*, 3 LAW & HUM. BEHAV. 71, 82–83 (1979) (arguing that the Wilson & Donnerstein (1977) and Kerr et al. (1979) studies did not have an actual "real" consequence condition because they relied on

ambitious meta-analysis that evaluated twenty years of jury research in *Law and Human Behavior*—both experimental studies and field research on actual jurors—concluded that mock jurors do not behave appreciably differently from the way real jurors do.[98] These findings challenge the belief that being open with jurors may lessen juror attention and the seriousness of deliberations.

Moreover, the success of the trial consulting industry also challenges the notion that being open with summary jurors would limit the utility of their deliberations. When trial consultants conduct mock trial or focus group proceedings for a party to a dispute, they typically inform their mock jurors that their decisions, rather than binding the parties to a particular outcome, will be used to gain an understanding of how real jurors would perceive the case.[99] Thus, the advisory nature of their decisions is made clear. The reported utility of the data from such sessions in terms of understanding the case and predicting outcomes suggests that obtaining valid information without deceiving participants about the nature of their role is in fact quite feasible.[100]

"convincing college students in a laboratory situation that their decisions had real consequences"); Saks & Marti, *supra* note 68, at 454 (arguing that because of the lack of realistic conditions, no ideal studies have been conducted involving how jury size affects a trial).

[98] Brian H. Bornstein, *The Ecological Validity of Jury Simulations: Is the Jury Still Out?*, 23 LAW & HUM. BEHAV. 75, 88 (1999).

[99] Parties to a dispute often hire trial consultants to conduct mock trial proceedings before a group of laypeople who are representative of the jury pool in the venue where the trial would be held. Because using such consultants typically takes place as part of the adversarial process, rather than having both parties formally represented at the proceedings, the lawyers of the party who hired the consultants prepare abbreviated versions of both parties' arguments and evidence presentation. To prevent the mock jurors from being biased in their opinions, the participants are usually not told which party hired the consultants until after the proceedings. *See generally* Franklin Strier & Donna Shestowsky, *Profiling the Profilers: A Study of the Trial Consulting Profession, its Impact on Trial Justice and What, If Anything, To Do About It*, 1999 WISC. L. REV. 441; Franklin Strier, *Paying the Piper: Proposed Reforms of the Increasingly Bountiful but Controversial Profession of Trial Consulting*, 44 S.D. L. REV. 699 (1999).

[100] *See* Strier & Shestowsky, *supra* note 99, at 464 (1999) (describing indicators of trial consulting success); Mary Helen Yarborough, *Lawyers Turn To Jury Consultants*, HR FOCUS, Feb. 1996, at 9 (stating that Litigation Sciences Inc. claims a ninety-six percent accuracy rate in predicting the outcome of a case); *see generally* Dennis P. Stolle, et al., *The Perceived Fairness of the Psychologist Trial Consultant: An Empirical Investigation*, 20 LAW & PSYCHOL. REV. 139, 143–47 (1996) (reviewing empirical evidence on the efficacy of consulting).

A second reason why SJTs have been sharply criticized for deceiving jurors is that such deception can be detrimental to the legal system. Judge Posner has questioned the ethics of this type of deception:

> Never telling the jury worries me . . . . Telling the jurors after they have delivered the summary verdict that the verdict is not legally binding is only a partial anodyne for my concern . . . . The jurors are still being fooled; and they are learning that juries sometimes make decisions and at other times simply referee fake trials. As word spreads, the conscientiousness of jurors could decline; it is almost a detail that the utility of the summary jury trial would also decline.[101]

Indeed, if the general public becomes aware that "some jurors are being fooled into thinking they are deciding cases when they are not, it could undermine the jury system."[102] Research on procedural justice has shown the importance of the public's perception of the legal system in terms of promoting adherence to the law.[103] If the public accepts the idea that jurors are being "lied to" when participating in SJTs, the legal system might be irreparably harmed.

The rules strictly limiting deception in psychology are important in that they help to protect the reputation of the discipline, and to prevent researchers from inadvertently discouraging individuals from wanting to participate in research. Courts should follow this example by strictly limiting the use of deception in SJTs. Judges should tell summary jurors precisely the truth—that their judgments can provide the parties with a better and more realistic idea of what jurors would think of their case, and that such information often makes parties more willing to settle out of court by using the SJT verdict as a source of information as to what kind of settlement would be reasonable. That is, even though their decisions are advisory rather than binding, they do indeed have consequences for the parties because the parties will consider them when they decide whether to settle, and, if so, for how much. In fact, their verdict may end up being the exact terms of the settlement agreement. When they tell jurors about their advisory role, judges should also stress the importance of summary juries in the legal system:

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[101] Posner, *supra* note 79, at 386–87.

[102] *Id.* at 386. Even if the judge, at the end of the trial, describes the deception as a "necessary" tool in an attempt to maximize the approximation to a real jury trial, the initial deception is a significant liability to the legal system.

[103] *See generally* TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1990) (drawing a causal connection between perceptions of fairness, judgments of legitimacy, and future compliance with the law).

> Judges should inform jurors that their efforts to render fair, advisory SJT verdicts may help to speed up case processing, decrease court backlogs, and reduce party and court time and costs. Jurors, as taxpayers, are concerned about court costs and, as seekers of justice, are concerned about fairness and efficiency in case processing. If properly informed about the benefits of their advisory verdict, jurors will be more likely to appreciate the seriousness and importance of their role.[104]

Informing the summary jurors honestly about their role would help to protect the reputation of both the traditional and summary jury trial systems, with little sacrifice in how seriously summary juries deliberate.

B. *Informed Consent*

Another lesson that SJT administrators can learn from psychologists is the importance of obtaining informed consent. In psychology, the doctrine of informed consent requires all participants, whether research participants or the recipients of services, to knowingly, intelligently, and voluntarily consent to psychological procedures.[105] Judges could follow suit by informing jurors of the exact nature of their role at the start of the process.

The idea of informed consent would also require that summary judgment service be voluntary. Summary jurors would be willing volunteers—either paid or unpaid. Obtaining informed consent and making service voluntary would weaken the constitutional arguments against SJTs. These arguments hold that judges do not have the authority to convene a jury merely to assist the settlement process.[106] For example, in *Hume v. M & C Mgmt.*,[107] the District Court for the Northern District of Ohio held that federal judges do not have the authority to mandate SJTs. The court reasoned that nothing in the Jury Selection and Service Act[108] required citizens to serve on juries for SJTs.[109] It held that federal judges "have no authority to summon citizens to serve as settlement advisors, just as they would have no authority to summon citizens to serve as hand servants for themselves, lawyers, or litigants."[110]

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[104] Ponte, *supra* note 8, at 1097.

[105] Diana Baumrind, *Some Thoughts on Ethics of Research: After Reading Milgram's "Behavioral Study of Obedience,"* 19 AM. PSYCHOL. 421, 422 (1964).

[106] *See* Connolly, *supra* note 30, at 1457; Moore, *supra* note 42, at 515–16. For a useful discussion of judicial power to mandate the SJT, see Webber, *supra* note 8.

[107] Hume v. M & C Mgmt., 129 F.R.D. 506, 508–09 (N.D. Ohio 1990).

[108] 28 U.S.C. § 1861 (1994).

[109] *See Hume*, 129 F.R.D. at 508–09.

[110] *See id.* at 510.

Some legal commentators have criticized the idea of using volunteer, privately paid, jurors. As one commentator has argued:

> Such a development would likely spell the death of the summary jury trial in federal court. There would be no real economic advantage to electing the SJT over a regular trial. There would also be many procedural problems arising from private parties trying to draw a jury, such as how to ensure that a random sample of the potential jurors is drawn even when some of them do not respond to requests to serve or refuse to participate once contacted.[111]

But a close analysis of what a voluntary program might look like suggests that a voluntary program might reach the same end as a mandatory one.[112] A court could select summary jurors from those who have been part of the venire, but were not chosen for jury service.[113] Those who appear for voir dire have probably already made plans to set aside their day to participate in the legal system.[114] As one commentator has argued:

> [Those who have not been chosen for service] have [already] been paid and recognized as qualified jurors. With the proper appeal, a judge might convince many in the panel to volunteer to serve on the summary jury. Even if some jurors decline to serve, their absence would not defeat the advantages of the SJT. After all, the summary jury would still consist of citizens who have been drawn at random, although the opting out of certain jurors jeopardizes the randomness to a certain extent. Even so, since the decision of the summary jurors is not binding on the parties or the court, the need for a scientifically random sample of citizens compelled into service is not nearly as strong.[115]

As Judge Connolly, a district court judge from Minnesota, has suggested, "the clerk of court [could] ask prospective jurors if they would be interested in serving on a condensed case that would probably only last one to two days."[116] In doing so in his own court, he has received many volunteers.[117] If

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[111] Charles W. Hatfield, *The Summary Jury Trial: Who Will Speak for the Jurors?*, 1991 J. DISP. RESOL. 151, 157.

[112] *Id.* at 159.

[113] *Id.*

[114] *Id.*

[115] *Id.* The voir dire process ensures that even individuals who end up serving on real juries are not randomly selected from the community. During this process, some venire candidates may be excused by the court, others still are removed from the panel as a result of for-cause challenges or peremptory strikes.

[116] Connolly, *supra* note 30, at 1458.

a judge approaches those who have been dismissed from regular jury service and frames SJT service as an opportunity to learn about the legal system, provide non-binding suggestions to their fellow citizens, and help reduce crowded dockets which their tax money maintains, volunteer SJT service could become quite feasible.

IV. CONCLUSION

An analysis of SJTs from a research psychological perspective has been long overdue, and the insights are significant. First, SJTs should use multiple panels. Second, summary jurors should deliberate in order to provide group-level case evaluations. Third, the jury size used in a given SJT should match that which would be used in a traditional jury trial for that type of case, in that particular venue. Rather than relying on their own intuitions, judges should apply the empirical findings about jury behavior to guide and structure SJTs. Doing so would enhance the ability of SJTs to predict traditional jury outcomes and provide litigants with more valid information upon which to rest their settlement decisions.

We should challenge SJT administrators to incorporate the lessons described in this Article and to systematically study the resulting "modified" SJTs. A study using random case assignment, similar to the one conducted in Ramsey County,[118] would be useful for comparing current (unmodified) SJTs, modified SJTs, and traditional jury outcomes for similar kinds of cases in similar venues.[119] Such a test would likely find the outcomes of modified SJTs to have significantly greater similarity to traditional jury outcomes when compared to outcomes of unmodified SJTs. This prediction rests on the fact that summary juries formed by the guidelines proposed herein would be structured much more like traditional juries. As part of such a study, lawyers, litigants, and summary jurors should be asked to rate their perceptions of SJT effectiveness, legitimacy, and overall fairness. Summary jury trials that implement the guidelines discussed herein should prove to be more successful in terms of these types of criteria.

These modified SJTs, however, would not necessarily produce higher settlement rates than unmodified SJTs because the current (unmodified) system for conducting SJTs can lead to settlements under "false pretenses."[120] That is, juries of less than six (currently common in SJTs) can

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[117] *See id.*

[118] *See supra* notes 25–29.

[119] The unmodified form of SJTs used in such a study should be in the format used by Lambros, since this format is most common. *See supra* Part I.

[120] *See supra* notes 56–57 and accompanying text.

inadvertently inflate the perception that the evidence is unequivocal, which may in turn promote settlement in cases that would not seem so "one-sided" when reviewed by a larger jury. Modified SJTs would, however, increase the validity or "correctness" of settlement decisions. Because of this increase in accuracy, even currently skeptical legal practitioners and members of the public might come to accept SJTs as sufficiently reliable predictors of jury trial outcomes. This increased acceptance might lead to increased settlement rates over the long-run.

This Article also discussed insights from psychology with respect to the treatment of summary jurors. One implication of the research and ethical considerations reviewed herein is that SJT administrators should develop ethical norms that require obtaining informed consent from participants. They should also strictly limit the use of deception. Empirical research suggests that any "benefit" derived from misleading summary jurors as to the advisory nature of their decisions is inconsequential, and, moreover, does not outweigh the potential cost to the legal system's reputation. The legal system should be very wary of encouraging the perception that it misleads citizens about jury duty or that it uses people as settlement advisors—a civic duty not widely promulgated or provided for explicitly by any law—without their informed consent. If SJT administrators were to adopt and follow guidelines similar to the APA rules concerning deception and informed consent, much of the legal criticism regarding SJTs would lose force.

Overall, SJTs are a very promising form of ADR. They deserve our careful consideration and thoughtful suggestions for improvement. With some procedural modifications, like those proposed herein, SJTs might provide litigants with very valuable information that they can use to make settlement decisions. In their current form, however, SJTs often fall significantly short of their potential and risk tainting public perceptions of the legal system in general, and of ADR more specifically.